

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

RANDALL'S ISLAND FAMILY
GOLF CENTERS, INC., ET AL.,

Debtors.

Hearing Date: February 16, 2001
Time: 10:00 a.m.

Case Nos. 00-41065-smb
through 00-41196-smb

Chapter 11

**SUPPLEMENTAL OBJECTION OF THE CITY AND COUNTY OF DENVER, COLORADO
TO THE ASSUMPTION AND ASSIGNMENT OF ITS CONCESSION LICENSES**

To the Honorable Stuart M. Bernstein
Chief United States Bankruptcy Judge

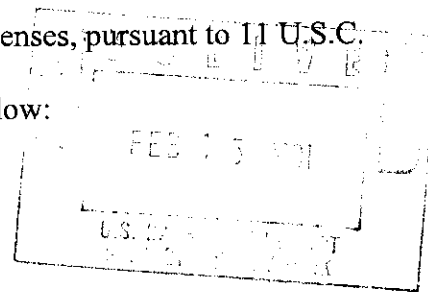
The City and County of Denver ("Denver"), a creditor in the above-captioned bankruptcy case, by and through its local counsel, Harter, Secrest, & Emery LLP, submits this supplemental objection to the assumption and assignment of its Concession Licenses, pursuant to 11 U.S.C. section 363 (the "Bankruptcy Code"), for the reasons set forth below:

BACKGROUND

1. The facts are set forth in the City and County of Denver's initial objection and are incorporated herein by reference.

RELIEF REQUESTED

2. Pursuant to 11 U.S.C. section 365(c) a trustee cannot assume or assign any executory contract or unexpired lease of the debtor if applicable law excuses a party from accepting performance by an entity other than the debtor.



(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignments of rights or delegation of duties, if-

(1)(A) applicable law excuses a party, other than the debtor, to such contract lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment

11 U.S.C. §365(c)(1) (emphasis added).

3. The Constitution for the State of Colorado specifically provides for home rule for cities and towns in Article XX, Section 6.

Home rule for cities and towns. The people of each city or town of this state. . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

* * *

From and after the certifying to and filing with the secretary of state a charter . . . such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4, and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate conduct and control:

* * *

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof . . .

* * *

The provisions of this section 6 shall apply to the city and county of Denver.

- Constitution for the State of Colorado, Art. XX, Sec. 6.

4. Case law from the state of Colorado has interpreted the home rule provision of the Colorado Constitution as giving municipalities exclusive control in matters of local concern. See e.g., *City & County of Denver v. Tihen*, 77 Colo. 212, 235 P. 777 (1925); *City & County of Denver v. Bossie*, 83 Colo. 329, 266 P. 214 (1928); *People ex rel. Hershey v. McNichols*, 91 Colo. 141, 13 P.2d 266 (1932); *Independent Dairyman's Ass'n v. City & County of Denver*, 142 F.2d 940 (10th Cir. 1944)(the City and County of Denver has exclusive power to legislate on matters of local and municipal concern).

5. In the State of Colorado, a home rule city has plenary legislative authority over matters local in nature. See e.g., *Kelly v. City of Fort Collins*, 163 Colo. 520, 431 P.2d 785 (1967). A home rule city is granted every power possessed by the general assembly as to local and municipal matter, unless the city's charter provides otherwise. See e.g., *Service Oil Co. v. Rhodus*, 179 Colo. 335, 500 P.2d 807 (1972).

6. The Colorado Supreme Court has held that section 6 of Article XX of the Colorado Constitution gives absolute control over the granting of franchises to use city streets, alleys, and public places to a home rule entity. *City of Greeley v. Poudre Valley R. Elec.*, 744 P.2d 739 (Colo. 1987), *app. dismissed* 485 U.S. 949 (1988). The court determined that the ability to grant a franchise is a sovereign power, and when a city grants a franchise it is acting as an agent of the state utilizing the state's sovereign power. *Id* at 744. The court defined a municipal franchise as a special right or privilege granted by the government, that does not belong to citizens in general. *Id*. The Concession Licenses at issue are a municipal franchise because the City and County of Denver granted them and the right to operate a Concession on the property of the City and County of Denver does not belong to citizens in general. By

granting the Concession Licenses the City and County of Denver acted in accordance with the sovereign powers of the State of Colorado and clearly this is applicable nonbankruptcy law.

7. This Honorable Court has previously ruled that a nonexclusive copyright license cannot be assumed and assigned, *In re Patient Education Media, Inc.*, 210 B.R. 237 (Bankr. S.D.N.Y. 1997), and that a membership in a partnership is not assignable, *In re David Schick Venture Mortgage Corp.*, 235 B.R. 318 (Bankr. S.D.N.Y. 1999). In *Patient Education Media*, this Honorable Court determined that Section 365(c) governs contracts that would not be assignable under applicable nonbankruptcy law. “The court must look to the ‘applicable law’ and determine whether [the debtor] can assign the [] license.” *Patient Education Media* at 242. After reviewing the applicable nonbankruptcy law, this Honorable Court did not allow the assignment of the copyright license even though “the assignment of the [] license [would] maximize the assets available to creditors, this goal must give way to the countervailing considerations expressed in section 365(c). *Id* at 243. It is clear that applicable nonbankruptcy law prohibits the assignment of the City and County of Denver’s Concession Licenses without its consent. The Colorado State Constitution grants each City and County within the state exclusive authority to govern its property. This State Constitutional Authority is embodied in the Municipal Code of the City and County of Denver, which granted the exclusive authority to bind the City and County of Denver to any Concession License to the Department of Parks and Recreation. This is clearly applicable nonbankruptcy law and therefor, the Concession Licenses are not assignable without the consent of the City and County of Denver.

8. In *Schick Venture Mortgage Corp.*, this Court reviewed Section 365(c)(1) of the Bankruptcy Code. “[S]ection 365(c)(1) is concerned with non-assignable rights and non-delegable duties under non-bankruptcy law. . . . Generally, a right is not assignable if assignment

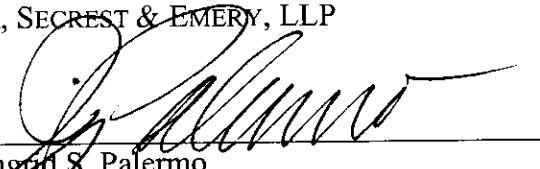
would materially change the duty of the obligor, increase his burden or risk or impair the chance of receiving a return performance or reduce its value.” *Schick Venture Mortgage Corp* at 323 (internal citations omitted). In the situation at hand, the proposed assignment will increase the City and County of Denver’s risk and impair its chance of receiving a return. Prior to any entity obtaining a license from the Department of Parks and Recreation, that entity must provide both personal and financial references. The entity must demonstrate that it has the ability to be successful under the license, including experience in concessions. The Department of Parks and Recreation grants an entity a license based upon that entity’s professional and financial references. Therefore, the Concession Licenses should not be assignable, not only due to the Municipal Code of the City and County of Denver, the Colorado State Constitution, and Colorado case law, but also because the Concession Licenses are granted based upon an entity’s ability perform under the Concession License.

WHEREFORE, Denver respectfully requests that this objection be granted in full, that the Court deny the assumption of the Denver Concession Licenses and granting such other and further relief as this Honorable Court deems just, fair and proper.

Date: February 14, 2001
Rochester, New York

HARTER, SECREST & EMERY, LLP

By: _____


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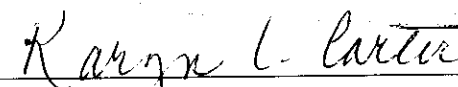
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Chapter 11

AFFIDAVIT OF SERVICE

KARYN L. CARTER, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the instant action, and resides in Monroe County, New York.

That on February 14, 2001, she served the foregoing **SUPPLEMENTAL OBJECTION OF THE CITY AND COUNTY OF DENVER, COLORADO TO THE ASSUMPTION AND ASSIGNMENT OF ITS CONCESSION LICENSES** via UPS Next Day Air, charges prepaid, upon the individuals at the address listed on the attached Service List.


Karyn L. Carter

Sworn to before me this
14th day of February, 2001


Notary Public

INGRID S. PALERMO
Notary Public, State of New York
MONROE COUNTY
Commission Expires Oct. 2, 2002